



TERRITORY OF GUAM

OFFICE OF THE GOVERNOR

AGAÑA, GUAM 96910

U. S. A.

EXECUTIVE ORDER NO. 98-11

**RELATIVE TO PROMULGATING EMERGENCY RULES
AND REGULATIONS FOR THE CUSTOMS,
AGRICULTURE, AND QUARANTINE INSPECTION
SERVICES CHARGE.**

WHEREAS, in accordance with §9302 of Title 5, Guam Code Annotated, and pursuant to Section 47143 of the Government Code as amended in Public Law No. 24-14, the attached amendment to Rules and Regulations governing the Customs, Agriculture, and Quarantine Inspection Services Charge are hereby adopted as emergency rules and regulations based upon the following:

1. Section 18 of Chapter III of Public Law No. 23-45, containing Government Code Sections 47143, et seq., mandates the collection of a Customs, Agriculture, and Quarantine Inspection Service Charge by the Antonio B. Won Pat Guam International Airport Authority (GIAA) and the Customs and Quarantine Agency (CQA) upon all air and sea carriers.
2. Section 47149 of the Government Code authorizes the Director of CQA to promulgate rules and regulations to implement Government Code Section 47143, et seq., including rules governing the procedure of collection of the service charges, for periodic review of the costs of providing inspection services and the level of charges levied, and other matters.
3. The Federal Aviation Administration (FAA) Airport District Officer, Western-Pacific Region, U.S. Department of Transportation (DOT), in letters dated November 13, 1995 and January 16, 1996, copies of which are attached hereto and designated as Exhibits A and B, advised that the service charges were not in conflict with Federal Anti-Head Tax Act, (AHTA), §40116 of Title 49, United States Code, however, if the charge amounts exceed the actual costs of providing inspection services, the charges might be considered a prohibited tax under the AHTA, and further, that payment of excess service charges might be considered a prohibited use of airport revenue under §47107(1)(2)(A) of Title 49 United States Code.
4. To avoid violation of these federal laws, the FAA Airports District Officer advised that "the GAA and GCQA must ensure that the level of the service fees do not exceed the costs of providing inspection services at GUM". See Exhibit A.
5. On September 12, 1997, pursuant to Section 27 of Chapter 4, and Exhibit B attached to Chapter 5, of Public Law No. 24-59, the General Appropriation Act for Fiscal Year 1998, the projected cost for providing, maintaining, and operating the service charge facility in relation to air passenger services in Fiscal Year 1998 is \$9,816,058, and thus necessitates



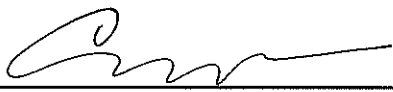
that the current service charge applicable to air carriers be adjusted from \$7.27 to \$6.36 to comply with the AHTA.

6. in accordance with §9302 of Title 5, Guam Code Annotated, and pursuant to Section 47143 of the Government Code as amended in Public Law No. 24-14, the establishment, modification, or adjustment of any service charge levied pursuant to this Section shall be subject of the provisions of the Administrative Adjudication Law.
7. On December 30, 1997, a public hearing was held by the CQA on a proposed amendment to Sections III.A.2 and IV.A.4 of the Customs, Agriculture, and Quarantine Inspection Service Charge rules and regulations, in accordance with the Administrative Adjudication Law.
8. As a result of these amendments, the current service charge of \$7.27 will be reduced to \$6.36 for Fiscal Year 1998.
9. The rates as amended will be in accordance with the advice of the FAA that the service charge not be excessive and thereby not violate the AHTA.
10. Pursuant to the Administrative Adjudication Law, "No rule shall be effective until after. . . ninety (90) days have elapsed from the date of filing with the Legislative Secretary."
11. Allowing the Ninety (90) days elapsed time from the date of filing with the Legislative Secretary will not meet the April 1, 1998 deadline date for the revised Fiscal Year 1998 service charge of \$6.36 to go into effect.
12. Immediate adoption of the proposed amended service charge pending the Ninety (90) days compliance period, on an emergency basis, is necessary to comply with, and abide by, the provisions of the AHTA.


NOW, THEREFORE, I, CARL T. C. GUTIERREZ, Governor of Guam, by virtue of the authority vested in me by the Organic Act of Guam, as amended, do order:

1. The proposed amended rules and regulations attached to this Executive Order and designated as Exhibit C are adopted, and supercede and replace the existing relevant rules and regulations government the Customs, Agriculture, and Quarantine Inspection Services Charge, effective April 1, 1998.

SIGNED AND PROMULGATED at Agana, Guam this 28th day of February, 1998.


CARL T. C. GUTIERREZ
Governor of Guam

COUNTERSIGNED:


MADELEINE Z. BORDALLO
Lieutenant Governor of Guam

U.S. Department
of Transportation
Federal Aviation
Administration

Western-Pacific Region
Airport District Office

300 Ala Moana Blvd., Rm. 711
Honolulu, HI 96813
MAIL: Box 50244
Honolulu, HI 96880-0001
(808) 541-1230
FAX: (808) 541-3462

November 13, 1995

Mr. Rickie G. Reynolds
Executive Manager
Guam Airport Authority
Commonwealth of Guam
PO, Box 8770
Tamuning, GU 96931

Dear Mr. Reynolds:

This letter responds to your request for the Federal Aviation Administration (FAA) review of recently enacted legislation establishing a customs and agricultural inspection service fee to be collected by the Guam Airport Authority (GAA) at the Guam International Airport Terminal (GUM), Agaña, Guam. Based on our review of the legislation and information currently available, the legislation does not appear to be facially inconsistent with Federal requirements governing generation and use of revenue at publicly-owned airports. However, I want to take this opportunity to alert you to FAA concerns regarding implementation of the legislation.

As enacted, the legislation authorizes the GAA to assess and collect from air carriers landing at GUM a service charge for customs and inspection services provided at GUM (§47145). The legislation further authorizes the GAA to reimburse the Guam Customs and Quarantine Agency (GCOA) and Department of Agriculture for the costs of performing the various inspections at GUM and to apply the service charge to pay for those costs (§47146). The legislation further authorizes the Director of the GCOA to promulgate rules and regulations governing the service charges, including provisions establishing periodic review of the costs of providing the services and of the level of charges levied (§47149). The legislation also establishes an initial service fee of \$10 per passenger and \$5.00 per consignment of air cargo, "(u)ntil the first rules and regulations required by §47149 have been promulgated and based on a preliminary assessment of the actual costs" of the services provided (§47144).

The FAA has considered the legislation in light of the Anti-Head Tax Act, 49 U.S.C. § 40116 (AHTA). The AHTA generally prohibits state and local taxation of air commerce, passengers traveling in air commerce and the sale of air transportation. The AHTA excludes from this prohibition reasonable landing fees, rental charges and other service charges paid by aircraft operators for using airport facilities. The FAA has also considered the legislation in light of AIP grant assurances requiring that revenues generated by an AIP obligated airport be used for the capital and operating costs of the airport, 49 U.S.C. § 47107(b). Based on provisions of the FAA Authorization Act of 1994, Pub. Law 103-305 (August 23, 1995), payments by an airport sponsor under these payments

EXHIBIT A

reflecting the value of services and facilities provided to the airport are to be considered a prohibited use of airport revenue, 49 U.S.C. § 47107(1)(2)(A).

Based on the terms of the legislation it appears that the service charge is intended to be imposed on aircraft operators to recover the costs of providing inspection services and facilities at GUM. The FAA notes that the initial charges are based on preliminary estimates of costs and are to stay in effect only until a rulemaking establishing costs and fee levels is completed. If implemented as intended, the legislation does not appear to conflict with the AITA or with the requirements for the use of airport revenue. Accordingly, the FAA has no basis for objecting to the legislation at this time.

However, if the service charges exceeded the actual costs of providing the inspection services at the GUM, the service charges might be considered to be a prohibited tax under the AITA. Moreover, in these circumstances, the payment of the service charge revenue by the GAA to the Guam Customs and Quarantine Agency and Department of Agriculture might be considered a prohibited use of airport revenue under 49 U.S.C. § 47107(1)(2)(A). In other words, to avoid a conflict with these Federal requirements, the GAA and GCOA must assure that the level of the service fees do not exceed the costs of providing inspection services at GUM.

Therefore, the FAA strongly recommends that the GCOA promptly complete initial rulemaking to establish the costs of providing the inspection services and to establish the level of the inspection fees and that the GCOA review costs and fee levels on a regular basis.

Please call if you have any questions or require further information.

Sincerely,

Howard S. Yoshioke
Howard S. Yoshioke
Manager, Airports District
Office

EXHIBIT A



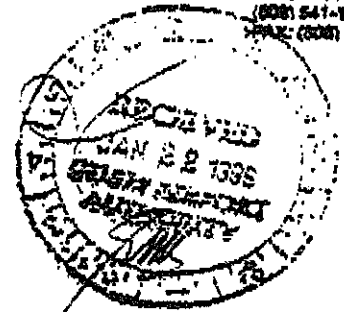
U.S. Department
of Transportation
Federal Aviation
Administration

Western-Pacific Region
Airports District Office

300 Ala Moana Bldg
Honolulu, HI 9681
MAIL Box 50244
Honolulu, HI 96866
(808) 541-1230
FAX: (808) 541-344

January 15, 1996

Mr. Kevin J. Johnson
Corporate Counsel and Assistant Secretary
Department A118D
5101 Northwest Drive
St. Paul, Minnesota 55111-3034



Dear Mr. Johnson:

Reference is made to your letter of December 4, 1995, regarding the Guam Customs, Agriculture, and Quarantine services charge (Guam User Fee) levied at Guam International Airport, Agaña, Guam. Our letter of November 13, 1995, was based upon a review of the legislation which concluded the following with respect to the reasons raised in your letter:

Reason 1.A. - "The legislation and regulations which implement the Guam User Fee show that the Guam User Fee related to passengers is, on its face, a head tax."

Section 40116(b) of 49 U.S.C. 40101 prohibits a State or political subdivision of a State from levying or collecting a tax, fee, head charge or other charge on an individual traveling in air commerce. A review of the legislation authorizing the Guam User Fee determined that it did not define the fee in a way which fit section 40116. The fee is levied on the aircraft, and based on the number of passengers which are on the aircraft.

Reason 1.B. - "The Anti Head Tax Act prohibits Guam from imposing the Guam User Fee as to Passengers."

The Guam User Fee is levied on an aircraft and is not levied on an individual. The prohibition in 49 U.S.C. 40116 is defined as levied on a person, the air fare, the sale, or the gross receipts from air commerce. The Guam User Fee has been determined to not be a head tax.

Reason 1.C. - "The anti-Head Tax Act prohibits Guam from imposing the Guam User Fee as to cargo."

Section 40116(2)(A) prohibits a State from assessing or levying a tax on property, but the property is the property of the air carrier. The property carried by an air carrier is not what is referred to. The Guam User Fee as it refers to cargo is not prohibited by the Anti-Head Tax Act.

EXHIBIT B

Guam Customs & Quarantine Fee



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Reason 1.D. - The Guam User Fee is not a permitted "Service Charge" under subsection (e) of the Anti-Head Tax Act."

Your letter states that subsection (b) contradicts and makes illegal section (e). Section (e) is speaking of services and taxes that are normally collected by local governments from individuals in their jurisdictions. Section (b) speaks of taxes levied on travelers and air carriers. The subject of each section is different.

The reasonableness of the fees is questioned. The actual cost of providing the services is not known at this time. The initial rate will be adjusted by regulation as the cost of the services becomes known. The actual adjustment of the service charge to reasonably relate to actual costs should be audited under the authority of the single audit act. The procedure is considered to be reasonable and proper.

Reason 2. - "The conditions placed upon the Guam User Fee in the FAA letter of November 13, 1995, do not save the Guam User Fee from the prohibitions of the Anti-Head Tax Act."

Our letter indicated that the anti head tax act may be violated if the fees collected were higher than the actual cost of the services rendered. It urged the Guam Airport Authority to determine the cost of the services and to adjust the fees as soon as possible. Regulations to this effect should be promulgated as soon as possible to avoid the possibility of conflict with Section 40116.

Based on the above, a change in the FAA position regarding the Guam User Fee is not considered to be necessary at this time. Please advise if we can be of further assistance.

Sincerely,


Howard S. Yoshitake
Manager, Airports District Office

/cc: GAA (Reynolds)

Exhibit B

 CUSTOMS & QUARANTINE AGENCY

III. SERVICE CHARGES

A. Air Carrier Services.

2. Charges. In order to calculate the service charges reasonably attributable to each air carrier for the service associated with that carrier, the Director shall determine the service charge to the several air carriers by the following methodology. The Director shall first estimate the current annualized costs of providing, maintaining, and operating the service charge facilities as they relate to air carrier operations, excluding air cargo operations, and then that annualized amount shall be divided by 12. The GIAA shall apportion such monthly amount among the several carriers in proportion to each carrier's revenue passenger volume subject to the services, times the cost per passenger determined below. Such monthly percentage of passenger volume shall be determined by reference to the monthly activity reports of passenger arrivals to be submitted to the GIAA by the air carriers. This apportionment methodology corresponds to the methodology used by the Agency, pursuant to a long-standing agreement with the air carriers, to apportion among the air carriers the Charges for Services of Customs and Quarantine Officers for the cost of using Agency personnel on an overtime basis.

Upon review and pursuant to this methodology, the Director has determined such total current annualized costs of providing, maintaining, and operating the service charge facilities as they relate to air carrier operations, excluding air cargo operations, is approximately \$9,816,058. Thus, the monthly charge attributable to all carriers is \$818,004.83 as of October 1, 1997 for which each air carrier shall be responsible for remitting to the GIAA its assessed pro rata service charge as determined by the GIAA under these rules and regulations. This monthly charge shall be converted to a cost per passenger for purposes of the apportionment methodology and air carrier ticketing and advertising by dividing the monthly charge by the average number of revenue passengers during the preceding fiscal year. In accordance with section IV.A.5 of these rules and regulations, the GIAA Airport Tariff Schedule will be amended on April 1, 1998 to reflect these charges accordingly.

EXHIBIT "c"

IV. SERVICE CHARGE REVIEW

The Director will review service charges at least annually and make such periodic adjustments as may be necessary in accordance with these rules and regulations.

A. Air Carrier Service Charges.

4. Formal Notice of Service Charge Adjustments. The Director will deliver written notice of any adjustment of the monthly service charge to GIAA and each air carrier subject thereto. In connection with the Director's annual budget review of the service charges as set forth under subparagraph 1 above, the Director will provide the GIAA and air carriers with at least six (6) months advanced notice before any annual service charge adjustment is made to the GIAA Airport Tariff Schedule. Notwithstanding this advanced notification on annual service charge adjustments, nothing in these rules shall be construed as to prohibit the Director from making, and implementing sooner, any periodic adjustment to the service charge as the Director deems necessary to prevent a significant under- or over-collection of the service charge. No service charge adjustments will take effect until the GIAA has amended the Airport Tariff Schedule and given notice thereof for a period of thirty (30) days in accordance with GIAA's Terminal Rules and Regulations. The amended Airport Tariff Schedule will set forth the adjusted annualized and monthly costs of customs, agriculture, and quarantine services to air carriers, and provide that each carrier will be assessed a proportionate share of the monthly costs based on its revenue passenger volume.

EXHIBIT C